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No. 94 - 14

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

UNITED STATES EX REL. KENNETH MOSAY, MARY WASHINGTON, AND ARCHIE MOSAY, AND KENNETH MOSAY, MARY WASHINGTON, AND ARCHIE MOSAY, INDIVIDUALLY AND ON BEHALF OF THE ST. CROIX BAND OF CHIPPEWA INDIANS,

Petitioners,

vs.

BUFFALO BROTHERS MANAGEMENT, INC., INTERSTATE GAMING SERVICES, ROY C. PALMER, AND RONALD G. BROWN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I. Introduction

In attempting to trivialize the decision of the court of appeals below, respondents Palmer and

Brown[1/] construct a "factual background" of irrelevant, inadmissible and disputed allegations and a legal analysis that ignores the express language of the applicable statutes. The court of appeals decision allows respondents to make off with over $23,000,000 (R. 158, Exs. And B) that, pursuant to 25 U.S.C. § 81 ("Section 81") and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq., ("IGRA), should have been returned to the St. Croix Band of Chippewa ("Tribe"). Further, the decision of the court below ensures that neither the Tribe here nor any other tribes will ever be able to recover the millions of dollars in tribal revenue lost as a result of contracts which violated IGRA standards and which were entered into during the four-and-a-half year period during which, according to the court of appeals, IGRA was enacted but of no force or effect.

II. The "Facts" Alleged by Respondents Are Irrelevant to the Question Before the Court.

This case was decided on motions for summary judgment. Virtually every factual allegation made by respondents in the "factual background" section of their Brief is irrelevant to the question presented here (and the issues on summary judgment) and was disputed in the courts

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1/ Respondents Buffalo Brothers Management, Inc. and Interstate Gaming Services, Inc. did not, apparently, join in the Brief in Opposition.

below. R. 97, R. 107; Appellants' C.A. Reply Brief at 2-6 and cites therein.2/

The relevant facts were set forth in the opinions of the courts below. The record reflects that respondents Buffalo Brothers Management, Inc. and Interstate Leasing, both wholly owned and controlled by respondents Palmer and Brown, entered into an arrangement with the Tribe that allowed them to reap almost 70 % of the net profits from the Casino operation (in addition to the loan payments by the Tribe); that even before the Casino opened, respondents knew that the leased machines would pay for themselves within a month or two, yet they advised the Tribe to extend the lease period for seven years; that the existence of the lease was never disclosed to the BIA before the management agreements were approved3/; and

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2/ For example, respondents' various claims that the Tribal unemployment dropped and that the Tribe benefitted economically from the Casino operations is not based on any admissible evidence; respondents simply made up these figures. The record does reveal that respondents siphoned off over $23,000,000.00 of money that should have gone to the Tribe under Section 81. R. 158, Exs. A and B.

3/ The undisputed facts in the record reveal that the existing lease was not disclosed in the information submitted to the BIA, and -- worse -- that respondents actively mislead the BIA by suggesting that there were no existing leases. As the district court found in its order granting

that, after this lawsuit was filed, respondents contrived to cancel the lease to insulate it from further review by the BIA. See Petition at 4-10.

These facts highlight the very abuses that Congress intended to remedy by passage of IGRA. If IGRA were effective, the collateral Interstate lease agreement would have been required to have been submitted to the BIA for approval along with the management contracts pursuant to 25 U.S.C. § 2711(a)(3), and the BIA could not have approved of the entire arrangement because it would have violated 25 U.S.C. § 2711(c)(1),(2). Further, petitioners and the Tribe would have a remedy under Section 81 for recovery of the wrongfully obtained monies.4/ Under the court of appeals decision, the very wrongs that Congress addressed in IGRA -- excessive fees to and sweetheart collateral agreements among contractors -- are allowed to go forever unremedied, all to the detriment of the Tribe's economic self-sufficiency and "congressional concerns . . . to protect such

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summary judgment: "The Interstate Lease Agreement was neither submitted or considered as part of the approval of the management agreement." Pet. App. 16a.

4/ As set forth in the Petition, one half of the proceeds of this suit goes to the United States in trust for the Tribe; the net proceeds of the remaining half have been assigned back to the Tribe by petitioners. See Petition at 8 n.5.

gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3).

III. The Decision of the Court of Appeals Ignores the Plain Language of IGRA.

Respondents state that the plain language of the statute should control. Petitioners agree. But neither the court of appeals nor respondents explain how the court of appeals's interpretation of IGRA comports with the plainly stated congressional intent reflected in the statute. An interpretation that suspends the effective date of IGRA for almost five years simply cannot square with the congressional recognition of the explosive growth and impact of Indian gaming and the urgent need to set standards to govern Section 81 review of management contracts and collateral agreements. 25 U.S.C. § 2701(2),(3). Under the plain language of the statute, the BIA had continuing authority to conduct Section 81 reviews until the National Indian Gaming Commission ("NIGC") was up and running; it was obviously the intent of Congress that the standards it had enacted in IGRA be employed in that review, and not the "inadequate" standards that prompted enactment of IGRA in the first place. Stated differently, the statute clearly does <u>not</u> state that, in conducting Section 81 reviews, the BIA was <u>not</u> to apply the review standards set forth in IGRA. The court of appeals decision not only violates congressional intent; it reads into the statute a prohibition not found in the plain language of IGRA.

IV. The Decision of the Court of Appeals Creates a Significant Statutory Gap.

As respondents recognize, the court of appeals should have decided the question whether the contracts at issue here complied with Section 81 and IGRA. Instead, the court of appeals went far beyond that simple question to find that IGRA, despite enactment in 1988, was completely ineffective between 1988 and 1993. It is this decision that creates the significant and long-term impact of this case.

Respondents disingenuously claim that the court of appeals decision really did not create a four-and-a-half year gap in the enforcement of IGRA. But even the court of appeals recognized that, under its interpretation, the statute was "fractured" because it left a period of almost five years during which management contracts were not subject to IGRA review. There is simply no question that the court of appeals decision created a period between 1988 and 1993 during which management agreements and collateral contracts were not subject to review under IGRA standards. As set forth in the Petition, this gap in the law is an unnecessary and unwarranted departure from congressional intent. It is a gap created by the court of appeals, not the Congress.

Next, respondents try to dismiss the significance of this statutory gap by suggesting that the NIGC has issued regulations allowing it to review gap contracts, i.e., those entered into between the enactment of IGRA in 1988 and the

opening-for-business of the NIGC in 1993. This argument fails for a number of reasons. First, there is no authority for this regulation. IGRA gives the NIGC power to review pre-IGRA and post-NIGC-establishment contracts -- not those entered into during the gap. Clearly, that was to be the function of the BIA. 25 U.S.C. § 2712. Neither respondents nor the courts below ever suggested a statutory basis for the NIGC's regulation allowing gap-period contract review. None exists.

Second, there is no evidence in the record even to suggest what the NIGC is in fact doing with respect to gap contracts. In this case, respondents attempted to submit their gap contracts to the NIGC on their own after petitioners filed their summary judgment motion in an attempt to manufacture a primary jurisdiction argument, which the trial court properly rejected. At the time of discovery in this matter, the NIGC stated that they were not reviewing respondents' contracts. R. 100. Review of gap contracts under 25 C.F.R. § 533.2 is entirely discretionary. Even assuming that the NIGC is conducting some kind of review of the gap contracts, there is nothing in the record to suggest that the NIGC is doing or can do anything to mitigate the harm caused by the court of appeals decision. 5/

5/ If NIGC is conducting a review using the IGRA standards, this simply bolsters petitioners' argument that the IGRA was not ineffective during the gap period.

Third, whatever the NIGC may be doing, the court of appeals decision precludes the tribes from ever recovering revenues lost as a result of gap-period contracts that violated IGRA. It is undisputed that the NIGC does not have the power under IGRA to order IGRA violators to return the wrongfully obtained monies; that is a right reserved for plaintiffs under Section 81. The court of appeals decision precludes a tribe, such as the St. Croix Band of Chippewa, from recovering any monies under Section 81 if its management contracts were entered into and approved by BIA during the gap period, without consideration of collateral agreements in violation of IGRA.

Thus, the Tribe here and the other tribes described in the Report of the Inspector General cited in the Petition are left without the remedy that Congress intended. Respondents attempt to minimize this situation by labelling it "episodic." This "episode," however, has allowed respondents here to siphon off more than $23,000,000.00 in Tribal revenues, and has led to the continuing injustices reflected in the Inspector General's report, all in an area of traditional federal concern. The court of appeals decision cannot be reconciled with either congressional intent or the long-standing policies of the federal government in matters relating to Indians.

V. Respondents Misstate Petitioners' Arguments

As a final matter, respondents set up "straw man" arguments that petitioners have not made. Although petitioners acknowledge that the lease agreement, standing on its own, would not be subject to review under Section 81 and IGRA, the fact that it is collateral to respondents' management contract brings it within the ambit of those statutes. Second, petitioners do not argue that respondents failed to comply with regulations that had not been enacted at the time the management contract was submitted to the BIA, as suggested by respondents. Rather, petitioners claim simply that the lease agreement was a "collateral agreement" under any reasonable definition or understanding of that phrase as it is used in the statute itself, 25 U.S.C. § 2711(a)(3). The fact that the NIGC later promulgated regulations defining "collateral agreement," which were designed to "closely implement Congress' intent", 57 Fed. Reg. 12382, 12388 (1992), and that clearly encompass the contracts at issue here, merely supports petitioners' argument.

VI. Conclusion

For the reasons stated above and in the Petition for Certiorari, petitioners respectfully request that the Court grant a writ of certiorari and set the matter for briefing and argument.

August 4, 1994

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